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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CZ SERVICES, INC., d/b/a CAREZONE
PHARMACY

Plaintiff,

vs.

EXPRESS SCRIPTS HOLDING COMPANY
and EXPRESS SCRIPTS, INC.

Defendants.

Case No.

COMPLAINT

**(i) False Representation of Fact in Violation of The Lanham Act
15 USC § 1125(a)
(ii) Trade Libel
(iii) Unfair Competition in Violation of Cal. Bus. & Prof. Code §§ 17200 et seq.
(iv) Intentional Interference with Prospective Economic Relations
(v) Negligent Interference with Prospective Economic Relations
(vi) Defamation**

DEMAND FOR JURY TRIAL

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1 Plaintiff CZ Services, Inc., d/b/a CareZone Pharmacy (“CZ Services”), through its
2 undersigned attorneys, alleges for its Complaint against Defendants Express Scripts Holding
3 Company and Express Scripts, Inc., (collectively “ESI”) as follows.

4 **NATURE OF THE ACTION**

5 1. This is an action against ESI for its publishing of defamatory statements against
6 CZ Services in violation of the Lanham Act, as well as trade libel, unfair competition, intentional
7 interference with prospective economic relations, negligent interference with prospective
8 economic relations, and defamation under the laws of California. This is also an action for unfair
9 competition based on ESI’s unlawful termination of CZ Services from ESI’s network in violation
10 of the Medicare Part D and Medicaid “Any Willing Pharmacy” (“AWP”) laws.

11 2. In an attempt to undermine CZ Services’ standing and inhibit competition from
12 CZ Services, ESI has repeatedly and publicly made false statements, including falsely stating
13 that CZ Services was operating in violation of various state laws and was operating in ways that
14 risked its customers’ safety.

15 3. By publishing these false statements about CZ Services, ESI has attempted to and
16 has harmed CZ Services. ESI’s false statements are particularly damaging to CZ Services in light
17 of the fact that CZ Services operates in a highly regulated pharmaceutical industry, assisting
18 individuals with obtaining prescription medications. By providing no evidence of the illegal
19 activity that it claims is occurring, ESI has encouraged consumers and state and federal
20 regulators to draw the false conclusion that CZ Services is not in compliance with state and
21 federal laws and risked its customers’ safety. ESI’s statements, which ESI had previously made
22 to CZ Services and which CZ Services had previously demonstrated were false, were intended to
23 undermine CZ Services’ position with various federal and state regulators, as well as with the
24 marketplace in which CZ Services and ESI operate.

25 4. As a result of Defendants’ actions, CZ Services will likely suffer a loss of
26 goodwill with state and federal regulators, loss of its otherwise loyal consumer base, and harm in
27 the marketplace in general. ESI’s actions also harm competition and consumers within the State
28

1 of California. This action seeks injunctive relief and damages for Defendants’ defamatory
2 statements.

3 5. In addition, ESI’s announced termination of CZ Services from ESI’s prescription
4 drug plan network violates the AWP provisions of the Medicare Part D Act, 42 U.S.C. §1395w-
5 104(b)(1)(A), and Section 1902(a)(23) of the Social Security Act for Medicaid, 42 U.S.C. §
6 1396a, each of which provides that a Pharmacy Benefit Manager (“PBM”) that serves Medicare
7 and/or Medicaid recipients—who make up roughly two-thirds of CZ Services’ customer base—
8 must allow all properly licensed pharmacies to participate in any health insurance plan.

9 6. ESI’s improper and unlawful actions in defaming CZ Services, and terminating
10 CZ Services from its network, will not only harm CZ Services, but also harm thousands of
11 patients who rely on CZ Services’ unique adherence packaging, partnership with the CareZone
12 app, and other services, depriving them of their choice of pharmacy and harming their health and
13 welfare.

14 **JURISDICTION**

15 7. The Court has subject matter jurisdiction under 28 U.S.C. § 1338(b), this being a
16 federal action for violation of the Lanham Act, 15 U.S.C. § 1125(a)(1), the Medicare Part D Act,
17 42 U.S.C. §1395w-104(b)(1)(A), and the Social Security Act, 42 U.S.C. § 1396a, joined with
18 related claims for trade libel, unfair competition, intentional interference with prospective
19 economic relations, negligent interference with prospective economic relations, and defamation
20 under the laws of California.

21 8. This Court also has subject matter jurisdiction over this action under 28 U.S.C. §
22 1332 because there is diversity of citizenship among the parties, and the amount in controversy
23 exceeds \$75,000 exclusive of interest and costs.

24 9. The Court has personal jurisdiction over the parties under due process and
25 California’s long-arm statute, California Code of Civil Procedure § 410.10. Plaintiff CZ Services
26 maintains its principal place of business and has its headquarters in Richmond, California, in this
27 District. Defendants maintain presence and regularly conduct business within California and this
28 District, including without limitation (a) by maintaining places of business in San Francisco and

Richmond, California, as represented on ESI's website;¹ and (b) by serving patients and other interested parties that Defendants know or have reason to know are located within in this District. In addition, ESI's conduct was calculated to cause injury to CZ Services within this District. ESI posted the false and defamatory statements identified herein on the Internet, where they were intended to and likely to be viewed by interested persons within this District, and where they were in fact viewed by interested persons within this District.

VENUE

10. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b), in which a substantial part of the events or omissions giving rise to the claim occurred.

INTRA DISTRICT ASSIGNMENT

11. This action arose in Contra Costa County. It is therefore properly assigned to the San Francisco or Oakland Division of this Court pursuant to Local Rule 3-2(d).

THE PARTIES

12. Plaintiff CZ Services, Inc., d/b/a CareZone Pharmacy ("CZ Services") is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business located at 860 Harbor Way South, Richmond, California 94804. CZ Services is a retail walk-in pharmacy that has been in operation since June 2015. It has licenses to fill prescriptions for the residents of all 50 states and the District of Columbia. CZ Services is wholly owned by Jonathan Schwartz, the former CEO of Sun Microsystems.

13. Defendant Express Scripts Holding Company is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business located at One Express Way, St. Louis, Missouri 63121.

14. Defendant Express Scripts, Inc., is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business located at One Express Way, St. Louis, Missouri 63121.

¹ See Express Scripts website, "Where We Are," available at <https://careers.express-scripts.com/us/en/whereweare> (last accessed 6/25/2018) (identifying the following locations in California: Costa Mesa, Irvine, Richmond, San Francisco).

1 15. ESI is the largest Pharmacy Benefit Manager (“PBM”) in the United States, with
2 more than 1.4 billion prescription drugs dispensed to consumers through its Pharmacy Services
3 Network each year. ESI conducts business throughout the United States and manages pharmacy
4 benefits for tens of millions of patients, including in this District. ESI also operates as a
5 pharmacy, directly or through subsidiaries that include ESI Mail Order Processing, Inc., and ESI
6 Mail Pharmacy Service, Inc. ESI, directly or through its subsidiaries, has sold prescription drugs
7 to consumers by mail-order delivery during all times relevant to this Complaint. In 2017, ESI’s
8 annual operating revenue from its operations exceeded \$100 billion.

9 **BACKGROUND**

10 16. CZ Services is an independent, retail pharmacy that dispenses prescriptions to
11 walk-in patients, or to a walk-in agent of the patient, as allowed under state and federal laws.
12 CZ Services is licensed, and in good standing, in all 50 states and the District of Columbia.

13 17. CZ Services has a partnership with CareZone Inc., a separate company that acts as
14 an agent for patients and assists patients and their family members in managing the patient’s
15 medications. The CareZone app allows a patient to take a photograph of his or her prescription
16 bottle and create an automatic list of all the medications he or she is taking, which can be shared
17 with family members or health-care providers, as well as program in automatic reminders to take
18 the proper dose of medication on time. Another service that CareZone provides to some of its
19 customers is coordinating the pickup of medications from pharmacies on behalf of those
20 customers, and the delivery of those medications to the patient for free. CZ Services also
21 provides “adherence packaging,” which assists patients in taking their medication regularly.
22 These services combine to provide a valuable resource to patients, particularly those managing
23 multiple health conditions and medications, and has assisted thousands of patients in increasing
24 their compliance with the medication regimens prescribed by their physicians.

25 18. ESI is a pharmacy benefit manager (“PBM”) that manages the pharmacy benefits
26 of approximately 83 million Americans. ESI is the 22nd largest company in the United States,
27 with 2016 revenue of approximately \$101 billion; in the same year, it processed more than
28 1.4 billion claims for prescription benefits. PBMs, such as ESI, are intermediaries between

1 insurance company plans and pharmacies. ESI is the largest PBM in the United States,
2 controlling close to 50% of the PBM market.

3 19. In addition to providing PBM services, ESI directly or through subsidiaries that
4 include ESI Mail Order Processing, Inc. and ESI Mail Pharmacy Service, Inc., also sells
5 prescription drugs by mail-order. ESI is the largest mail-order pharmacy company in the
6 United States, with approximately \$45 billion in annual revenue.

7 20. In its role as a PBM, ESI provides a bundle of pharmacy network services to
8 insurance carriers, known as its Pharmacy Services Network (“PSN” or “ESI PSN”), through
9 which all sales of prescription drugs must be made to the consumers whose drug benefits are
10 managed by ESI. Insurance companies that offer prescription drug benefits contract with ESI to
11 manage their insureds’ claims paperwork, negotiate with drug companies, and administer
12 reimbursements to pharmacies that fill their insureds’ prescriptions (on behalf of the insurance
13 company). In order to participate in ESI’s PSN, insurance companies must agree that ESI has
14 discretion to set the terms and provisions for administering the PSN.

15 21. When a patient member of ESI’s PSN goes to a drugstore, she pays the pharmacy
16 a copayment, and ESI reimburses the pharmacy for the remainder of the price it determines it
17 will pay the pharmacy for the prescribed medication. Thus, in order to process prescriptions
18 covered by an insurance company that uses ESI’s PSN, pharmacies must agree to ESI’s terms –
19 67,000 pharmacies in the United States have become providers. To become a provider, ESI
20 requires that pharmacies enter into its form Pharmacy Provider Agreement, a non-negotiable
21 contract with terms unilaterally determined by ESI. ESI’s Pharmacy Provider Agreement
22 (“Agreement”), as well as an extensive Network Provider Manual that the Agreement
23 incorporates by reference, allows pharmacies to sell prescription drugs to consumers through the
24 “retail, storefront” channel only, and expressly prohibits pharmacies from making sales to
25 consumers through “mail order[.]”

26 22. ESI has acted aggressively to enforce its prohibition on its broad definition of
27 mail-order pharmacies. ESI has taken this approach for a single reason: to steer as many patients
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1 as it can to its own mail-order pharmacy, in order to thwart competition from innovative market
2 entrants, and thereby increase ESI's profits.

3 **FACTS GIVING RISE TO THIS ACTION**

4 **A. ESI's Efforts to Eliminate Pharmacies that Provide Prescriptions via Mail**

5 23. In recent months, ESI has communicated to all provider pharmacies that they "are
6 prohibited from acting as mail-order pharmacies." In fact, when CZ Services inquired whether
7 ESI would work with mail-order pharmacies, ESI wrote that it "is a mail order pharmacy that
8 doesn't accept another mail order pharmacy service." *See* Exhibit A; *see also* Exhibit B. ESI has
9 launched a campaign, including onerous investigations and audits, to identify provider
10 pharmacies that ESI believes might compete with ESI's mail-order business. ESI has threatened
11 to punish provider pharmacies that engage in activities that ESI perceives as a threat to its mail-
12 order business. To enforce these threats, ESI has terminated numerous pharmacies for allegedly
13 engaging in activities that ESI characterizes as mail-order. CZ Services is a recent victim of these
14 tactics.

15 **B. ESI's Efforts to Terminate its Contract with CZ Services**

16 24. ESI has announced its plan to terminate its contract with CZ Services because
17 CZ Services has emerged as an innovative competitor to ESI's mail-order pharmacy business.
18 *See* Exhibits C–E.

19 25. Initially, ESI accused CZ Services of operating as a mail-order pharmacy service,
20 in violation of ESI's Pharmacy Provider Agreement, despite the fact that CZ Services has not
21 mailed or sent any prescriptions to customers. *See* Exhibits C–E. In reality, CZ Services fills
22 prescriptions both for patients who walk into CZ Services' pharmacies and for those who are
23 unable or unwilling to walk in themselves, and thus wish to have their prescriptions picked up
24 and delivered to them by their agents, like CareZone.

25 26. Over a ten-month period, ESI offered shifting and inconsistent pretextual
26 rationales for terminating its Pharmacy Provider Agreement with CZ Services. Despite several
27 months of CZ Services' good-faith negotiations, ESI ultimately sent CZ Services a notice of
28

1 termination that reiterates many of its false, pretextual allegations, and also terminates the
2 Agreement under the Agreement's "termination at will" provision.

3 27. ESI's real reason for terminating CZ Services is that CZ Services' innovative
4 services designed to better assist patients, combined with the services provided by CareZone,
5 threaten ESI's dominant position in the market for direct delivery of prescription drugs to
6 patients.

7 **C. ESI Posts Defamatory Content about CZ Services on its Website and Twitter**

8 28. On June 19, 2018, ESI posted an "industry update" on its website,
9 www.express-scripts.com, titled "The Facts About Care Zone." In this article, first posted the
10 morning of June 19, ESI made the following false statements about CZ Services, which ESI
11 refers to as "CareZone," that directly alleged, or otherwise implied, that CZ Services was
12 operating illegally:

13 Laws, rules and regulations govern how pharmacies operate and
14 how we, as a pharmacy benefit manager, work with those
15 pharmacies, and we regularly review the practices of pharmacies in
16 our network ... However when a pharmacy breaks the law,
17 misrepresents itself, or otherwise violates the agreement we have,
18 we take action, and remove it from the network.

17 In the case of CareZone, that is exactly what we are doing. During
18 a recent review, we found two CareZone Pharmacy locations were
19 operating in direct violation of the retail provider requirement in
20 their agreements, had failed to comply with a number of other
21 obligations under their agreements, and that many prescriptions
22 were being mailed to states where the dispensing pharmacy was
23 not licensed in violation of state law.

21 Because CareZone is violating state pharmacy laws and is
22 unwilling to comply with its contract, we are removing CareZone
23 from our network.

23 Exhibit F.

24 29. In short, ESI stated that CZ Services "breaks the law," was engaging in actions
25 "in violation of state law," and "is violating state pharmacy laws." None of those statements are
26 accurate. In addition, ESI knew or should have known that these statements were inaccurate at
27 the time that ESI posted them. State pharmacy licenses are a matter of public record. In its very
28 first response letter to ESI more than a year ago, CZ Services confirmed it is licensed in

all 50 states and the District of Columbia, and provided copies of specific licenses requested by ESI. Exhibits C–E.

30. Despite these falsehoods, ESI promoted this article on its Twitter account @ExpressScripts on June 19, 2018 at 9:21am, in the following tweet:



Exhibit G.

31. This tweet, stating or implying that CZ Services is not in fact delivering quality care, affordable access, or operating legally, was published to ESI's 21,800 Twitter followers.

32. By the afternoon of June 19, ESI posted a slightly modified version of its original post, changing the title to "Some Facts About Care Zone." The modified post preserved the falsehoods included in the morning post:

Our network pharmacies are expected to deliver quality care, affordable access, and operate legally. Good news is that most every one of the 70,000 pharmacies we work with shares those traits. Then there is CareZone.

We work with more than 70,000 pharmacies in America to make sure our members have affordable and convenient access to medicine, as well as quality pharmacy care. Most pharmacies comply with the rules. However, when a pharmacy breaks the law, misrepresents itself, or otherwise violates the agreement we have, we have to take action and remove it from the network.

In the case of CareZone, that is exactly what we are doing. During a recent review, we found two CareZone Pharmacy locations were operating in direct violation of the retail provider requirement in their agreements, had failed to comply with a number of other obligations under their agreements, and that many prescriptions

1 were being mailed to states where the dispensing pharmacy was
2 not licensed, which is a violation of state law.

3 Because CareZone is violating state pharmacy laws and is
4 unwilling to comply with its contract, we are removing CareZone
5 from our network.

6 Exhibit H.

7 33. Rather than retracting its false statements, ESI repeated and expanded them.
8 ESI spoke to reporters, including reporters from both CNBC and Axios, among others, and
9 reiterated these false statements that CZ Services was not complying with the relevant pharmacy
10 laws.

11 34. The June 19 post attached as Exhibit H remains online at the time of filing,
12 available to any Internet user who visits ESI's webpage. Given the size of ESI's business and
13 customer base, the promotion on this content on its website and Twitter account, and the severity
14 of the allegations that CZ Services is acting in violation of state and federal laws, ESI's
15 statements have caused and will continue to cause significant damage to CZ Services' reputation
16 and future business opportunities.

17 35. By accusing CZ Services of breaking both federal and state law, ESI's statements
18 are causing irreparable harm to CZ Services and to the public at large. The pharmacy industry is
19 highly regulated at both the state and federal level. Any accusation of illegal activity, especially
20 by an industry behemoth such as ESI, will needlessly draw the attention of state and federal
21 regulators, potentially cause the wasteful expenditure of public funds, cause competitive harm,
22 and dissuade vulnerable patients from using CZ Services' pharmacies.

23 36. By implying that the termination of CZ Services must be done to ensure "patient
24 safety," ESI is attempting to drive customers away from CZ Services by disseminating the false
25 rumor that CZ Services is not in compliance with laws in all 50 states and the District of
26 Columbia, where CZ Services' customers reside. These false statements deprive CZ Services'
27 patients of the unique, innovative services it offers to assist them in managing their care. By
28 publishing false statements, ESI has insulated its mail-order business from losing customers to
29 pharmacies and agents that provide better quality service, such as CZ Services.

1 37. ESI's false statements have done and are continuing to do significant damage to
2 CZ Services' business and reputation. CZ Services generated millions of dollars of revenue in
3 2016 and 2017, and its business has been growing at more than 200% year over year. While CZ
4 Services' damages have not yet been finally assessed given the recent nature of the post, CZ
5 Services' growth trajectory and business have already been impaired and will likely continue to
6 be impaired as a result of ESI's false statements. In addition, ESI's false statements have
7 interfered with CZ Services' relationships with regulators and investors, damaged CZ Services'
8 brand and goodwill, and have harmed CZ Services' and its employees' and principals'
9 reputations. In addition to the actual harm suffered, ESI's false statements that CZ Services has
10 broken state and federal pharmacy laws is defamation *per se*, entitling CZ Services to presumed
11 damages.

12 38. If Defendants continue to publicize these falsehoods, CZ Services will suffer
13 irreparable damage.

14 39. This is not the first instance of ESI using its website to publish defamatory
15 statements about an alleged competitor to its mail-order business. After a dispute with PillPack
16 pharmacy, in which ESI threatened to terminate its contract for PillPack's operation of operating
17 a mail-order pharmacy in violation of ESI's Pharmacy Provider Agreement, ESI published a
18 similar blog post to its customers about PillPack's alleged violation of state laws. Exhibit I.

19 40. By utilizing the internet to inform the public of contractual disputes, ESI is using
20 its dominant position in the industry to eliminate any competition to its mail-order pharmacy
21 business, depriving CZ Services' patients of their choice of pharmacy and the valuable services it
22 provides.

23 **D. ESI'S Illegal and Improper Termination of CZ Services from ESI's**
24 **Pharmacy Network**

25 41. Contrary to ESI's libelous and defamatory statements, CZ Services is operating
26 legally. ESI, however, is violating federal law and California unfair competition law by
27 terminating CZ Services from ESI's prescription drug plan network.

42. The “Any Willing Pharmacy” provision of the Medicare Part D Act, 42 U.S.C. §1395w-104(b)(1)(A), mandates that “[a] prescription drug plan shall permit the participation of any pharmacy that meets the terms and conditions under the plan.” 42 U.S.C. § 1395w-104(b)(1)(A). Likewise Section 1902(a)(23) of the Social Security Act, 42 U.S.C. § 1396a, provides Medicaid beneficiaries the right to obtain medical services “from any institution, agency, community pharmacy, or person, qualified to perform the service or services required ... who undertakes to provide ... such services.” These provisions are often referred to as the “any willing provider” or “free choice of provider” provision.

43. CZ Services meets the terms and conditions of the plans for Medicare Part D and Medicaid, and has accepted and complied with ESI’s standard terms and conditions, as described herein. Therefore, ESI must permit CZ Services to participate in its network under the AWP provisions.

44. The goal of the AWP provisions is to allow patients enrolled in Medicare or Medicaid prescription drug plans to obtain their prescriptions at the pharmacy of their choice. The Act ensures that a Medicare patient’s relationship with his or her pharmacist can be maintained by ensuring a pharmacy’s equal participation in the prescription drug plan.

45. Medicare covers uniquely vulnerable populations within the United States. In order to qualify for Medicare, potential beneficiaries must be 65 years of age or older, have certain disabilities, or have end-stage renal disease.² AARP data released in November 2017 found that, in 2016, more than one third of Medicare recipients were 75 or older; 16 percent qualified for coverage before turning 65, on the basis of permanent disability; and 66 percent lives with two or more chronic conditions.³ Medicare recipients also tend to be lower-income. In 2016, half of all Medicare beneficiaries had incomes less than two times the federal poverty

² Center for Medicare and Medicaid Services, General Info, *available at* <https://www.cms.gov/Medicare/Medicare-General-Information/MedicareGenInfo/index.html>

³ Olivia Dean, Claire Noel-Miller, and Keith Lind, Who Relies on Medicare? A Profile of the Medicare Population (AARP Public Policy Institute, November 2017), *available at* <https://www.aarp.org/content/dam/aarp/ppi/2017/11/who-relies-on-medicare-a-profile-of-the-medicare-population.pdf> (last accessed July 7, 2017).

1 level, and one in four had less than \$14,550 in total savings (e.g., retirement accounts and
2 financial assets).⁴

3 46. CZ Services serves this vulnerable population in a unique way: the vast majority
4 of patients who come to CZ Services use the CareZone app, which, as described above, is
5 designed to help chronically ill people manage their health and multiple medications. Because
6 most people who use the app are quite ill, most people who use the pharmacy are the same. The
7 average pharmacy patient is 56 years old and is taking five medications. Nearly 50% are on
8 Medicare and/or Medicaid. The pharmacy does not fill acute prescriptions—all of its patients are
9 on long-term maintenance prescription regimens. In addition, CZ Services provides pharmacy
10 care for participants in federal PACE programs serving elder populations, with the average
11 patient taking eleven medications.

12 47. The AWP provisions also protect a pharmacy's right to participate in Medicare
13 and Medicaid prescription drug dispensing. As stated above, CZ Services has remained in
14 compliance with all of the terms and conditions of ESI's provider agreement. However, ESI has
15 decided to proceed with the termination of CZ Services' provider agreement based on the false
16 pretense that CZ Services is operating a mail-order pharmacy.

17 48. ESI's decision to terminate the agreement ignores all the evidence that CZ
18 Services is not a mail-order pharmacy. This false, pretextual decision demonstrates ESI's desire
19 to abuse its powerful industry position to eliminating entities that ESI perceives to be potential
20 competition to its mail-order pharmacy business. And by terminating CZ Services from its
21 network, ESI is jeopardizing the health and care of CZ Services' uniquely vulnerable, elderly,
22 and poly-chronic patients, depriving them of the valuable services that CZ Services, on its own
23 and in conjunction with the CareZone app, provide in order to help them manage their health
24 conditions and medications. Without those services, these vulnerable patients' compliance with
25 prescription medications, and therefore their health and welfare, will suffer.

26 49. Given CZ Services' continued compliance with all terms and conditions of its
27

28 ⁴ *Id.*

1 provider agreement, ESI's termination is unlawful under the federal AWP law and represents
2 unfair competition under California law.

3 **CLAIMS**

4 **COUNT I**

5 **False Representation of Fact in Violation of The Lanham Act, 15 U.S.C § 1125(a)**

6 50. CZ Services restates and incorporates by reference each of the allegations set
7 forth herein.

8 51. After ten months of correspondence stating that CZ Services is in compliance
9 with state and local law, and that it does not operate a mail-order pharmacy, ESI published the
10 aforesaid public statements.

11 52. The publication of the message was in violation of Section 43 the Lanham Act,
12 15 U.S.C. § 1125(a)(1). In connection with goods or services in commerce, ESI used words
13 conveying a false or misleading representation of fact in commercial advertising or promotion.
14 These statements misrepresented the nature, characteristics, or qualities of CZ Services' goods,
15 services, and/or commercial activities.

16 53. Publication of these statements proximately caused special and general
17 compensatory damages to CZ Services.

18 **COUNT II**

19 **Trade Libel**

20 54. CZ Services restates and incorporates by reference each of the allegations set
21 forth herein.

22 55. The above-described publications by ESI were false and misleading. They
23 referred directly to CZ Services' business, specifically to the pharmaceutical services sold by CZ
24 Services and CZ Services' compliance with law. Furthermore, said publications are read and
25 understood to refer to the services sold by CZ Services.

26 56. The above-described statements by ESI disparaged CZ Services' business,
27 including the services sold by CZ Services.

1 57. The above-described statements induced customers to believe that CZ Services is
2 operating illegally.

3 58. As a proximate result of the above-described statements, CZ Services has suffered
4 substantial injury to its reputation and business valuation.

5 59. As a further proximate result of the above-described statements, CZ Services has
6 suffered substantial injury to its business, including but not limited to substantial loss of business
7 and income.

8 60. ESI published the statements described above with malice and fraud. ESI knew,
9 based at least on ten months of correspondence, that the content of the publication was false and
10 misleading and would result in substantial injury to CZ Services.

11 61. ESI communicated the content with the purpose and objective of causing injury to
12 CZ Services. CZ Services therefore seeks an award of punitive damages.

13 62. ESI has explicitly targeted CZ Services' business, both with respect to the goods
14 and with respect to the services that it sells. As a result, CZ Services will suffer lost profits and
15 damages to its business reputation and goodwill.

16 **COUNT III**

17 **Unfair Competition in Violation of Cal. Bus. & Prof. Code §§ 17200 *et seq.***

18 63. CZ Services restates and incorporates by reference each of the allegations set
19 forth herein.

20 64. By the facts alleged above, ESI has engaged in unfair competition within the
21 meaning of California Business & Professional Code § 17200 *et seq.*, (the "Unfair Competition
22 Law" or "UCL"), which prohibits "unlawful, unfair or fraudulent" business acts and practices.

23 65. ESI's conduct, as alleged herein, is unlawful because it constitutes a violation of
24 the laws described in the Counts in this Complaint. For example, ESI's conduct constitutes
25 defamation in violation of California Civil Code § 44, resulting in harm to Plaintiff and
26 consumers; it is unlawful for ESI to falsely accuse Plaintiff of violating state and federal laws on
27 its website and social media. ESI's unlawful business acts and practices significantly threaten
28

1 and harm competition in the market of pharmacies, and harm those consumers reliant on the
2 pharmaceutical services provided by CZ Services.

3 66. ESI's announced termination of CZ Services from ESI's network is also unlawful
4 as a violation of the AWP provisions of the Medicare Part D Act, 42 U.S.C. §1395w-
5 104(b)(1)(A) and the Social Security Act, 42 U.S.C. § 1396a. Those provisions mandate that a
6 PBM like ESI must permit the participation of any pharmacy in its network that serves Medicare
7 Part D and Medicaid prescription drug benefits and meets the criteria specified in that Act. CZ
8 Services meets the conditions of the AWP provisions. It is therefore unlawful for ESI to refuse to
9 permit CZ Services to participate in its network, and it is unlawful to use a false and pretextual
10 justification to terminate its provider agreement with CZ Services. ESI's unlawful termination
11 threatens and harms competition by systematically excluding pharmacies like CZ Services that
12 ESI (rightly or wrongly) views to compete with its captive mail-order pharmacy, and harms
13 vulnerable patients reliant on Medicare or Medicaid who have chosen to fill their prescriptions
14 with CZ Services and who will lose the ability to make that choice if CZ Services is excluded
15 from ESI's network.

16 67. In addition, ESI's conduct, as alleged herein, is unfair. ESI's conduct threatens an
17 incipient violation of an antitrust law, violates the policy or spirit of an antitrust law, or otherwise
18 significantly threatens or harms competition. For example, as described in detail above, it is
19 unfair for ESI to use its website and social media platform to falsely accuse Plaintiff of violating
20 state and federal laws. ESI has taken these actions in order to steer patients away from
21 CZ Services and to its own captive mail-order pharmacy, thwarting competition from innovative
22 market entrants like CZ Services, in an attempt to increase ESI's profits. ESI's actions have
23 harmed and are continuing to harm competition and consumers, and have caused substantial
24 reputational and financial injury to CZ Services.

25 68. ESI's conduct, as alleged herein, is fraudulent. Its statements about CZ Services
26 are false, misleading, and/or likely to deceive consumers. For example, the fraudulent statements
27 described more fully above, are likely to confuse and deceive the public that CZ Services is not
28 in compliance with state and federal pharmacy regulations. This confusion has injured and will

1 continue to injure both CZ Services and its consumers who rely on Plaintiff's pharmaceutical
2 services and who, before the defamatory statements were published, had no reason to believe that
3 CZ Services was not in full compliance with state and federal laws.

4 69. There were reasonably available alternatives to further ESI's legitimate business
5 interests, other than the conduct described herein.

6 70. ESI's unlawful, unfair, and fraudulent business acts and practices are a direct and
7 proximate injury to CZ Services. CZ Services has suffered harm in California, and in all 50 states
8 and the District of Columbia, where customers of Defendants and Plaintiff reside.

9 71. CZ Services has no adequate remedy at law for the foregoing wrongful conduct.
10 Absent injunctive relief, CZ Services will continue to be irreparably harmed by ESI's actions.

11 72. As alleged herein, Plaintiff has suffered injury in fact and lost money or property
12 as a result of ESI's conduct within the meaning of California Business & Professions
13 Code § 17204.

14 73. CZ Services seeks an injunction prohibiting ESI from continuing such practices,
15 corrective advertising, restitution, and any and all other relief this Court deems appropriate.
16 Cal. Bus. & Prof Code § 17203.

17 **COUNT IV**

18 **Intentional Interference with Prospective Economic Relations**

19 74. CZ Services restates and incorporates by reference each of the allegations set
20 forth herein.

21 75. Having engaged in the business of providing pharmaceutical services to
22 customers, economic relationships exist between CZ Services and numerous third parties as
23 existing or prospective customers. As a result of these relationships, CZ Services reasonably
24 anticipated a probability of future economic benefit.

25 76. As a competitor to CZ Services, ESI knew that Plaintiff was engaged in the
26 business alleged herein, and knew of the existence of the relationships alleged above and the
27 probability of future economic benefit arising from said relationships.
28

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment as follows:

- A. For monetary damages sustained by CZ Services as a result of ESI's unlawful acts as alleged in an amount to be proven at trial;
- B. For general and special damages;
- C. For statutory damages;
- D. For punitive damages;
- E. For treble damages;
- F. For presumed damages for harm to reputation;
- G. For an injunction against ESI and its officers, agents, servants, representatives, employees, attorneys, parents, subsidiaries, related companies, partners, successors, predecessors, assigns, distributors, and all persons acting for, with, by, through or under them, and each of them: restraining them from directly or indirectly publishing any additional false statements about CZ Services similar to those identified in this Complaint;
- H. For restitution and other equitable relief in an amount to be determined;
- I. For an order requiring ESI to retract and publish a correction for the false allegations published on its website;
- J. For an order requiring ESI to provide CZ Services a full and complete accounting of all amounts due and owing CZ Services as a result of ESI's activities complained of herein;
- K. For an order awarding Plaintiff its reasonable attorneys' fees;
- L. For costs of suit incurred herein;
- M. For prejudgment interest; and
- N. For such other and further relief as is just and proper.

JURY DEMAND

CZ Services demands a trial by jury on all issues so triable.

1 Dated: July 13, 2018

Respectfully submitted,

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